

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KIM L. MCNEAL

Claimant

VS.

GENERAL MOTORS CORPORATION

Respondent

Self-Insured

)
)
)
)
)
)
)

Docket No. 267,548

ORDER

Claimant appeals the May 30, 2003 Award of Administrative Law Judge Robert H. Foerschler. The Administrative Law Judge limited claimant to a 12 percent permanent partial disability to the body on a functional basis, finding that an "interim award" was appropriate under these circumstances, rather than awarding claimant a work disability under K.S.A. 44-510e. The Appeals Board (Board) heard oral argument on December 2, 2003.

APPEARANCES

Claimant appeared by her attorney, Michael R. Wallace of Shawnee Mission, Kansas. Respondent appeared by its attorney, Ronald A. Prichard of Kansas City, Missouri.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) What is the nature and extent of claimant's injury and disability?

- (2) Is the deposition of Thomas Meier, taken April 1, 2003, a part of the record?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board makes the following findings of fact and conclusions of law:

Claimant, a 49-year-old employee of respondent, was transferred from its Michigan facility to its Fairfax General Motors Plant in Kansas City, Kansas, in May of 1999. Claimant worked as a regular assembler, using power tools and repetitively using her hands. Claimant began developing problems in her hands and wrists, including swelling and pain, ultimately leaving her employment with respondent on June 18, 2001. The parties acknowledged at oral argument that no temporary total is being claimed, as claimant, under her contract with respondent, was paid her regular wages during the time when temporary total disability would normally have been provided.

Claimant was treated by her family doctor, Dr. Michael Shinn, but Dr. Shinn's deposition was not taken and his records were not placed into evidence. Claimant was later referred to plastic and reconstructive surgeon Richard Korentager, M.D., with the first examination occurring on September 25, 2001. Dr. Korentager noted that claimant had earlier developed right carpal tunnel syndrome and had undergone a successful carpal tunnel release in the mid-1980s.

After moving to Kansas City, claimant again began developing problems in her right upper extremity and also in the left upper extremity. Claimant exhibited weakness of the thenar musculature on the right side, with a positive bilateral Tinel's sign and a positive compression sign on the right. Dr. Korentager recommended nerve conduction studies bilaterally to ascertain the need for a right carpal tunnel release and synovectomy. The nerve conduction studies were negative. Dr. Korentager next saw claimant on September 4, 2002, again diagnosing bilateral carpal tunnel syndrome with potential arthritic changes in her wrists as well. He again discussed surgery, although he noted that there was only about a 5 percent chance that she would benefit from carpal tunnel releases.

Dr. Korentager recommended claimant avoid "laboratory [*sic*] tools"¹ or excessive repetitions at work, and should limit her lifting to 10 pounds.

¹ Korentager Depo., Depo. Ex. 3.

Dr. Korentager last saw claimant on December 5, 2002, at which time she continued with complaints of pain in her hands associated with the use of vibratory tools at work. Dr. Korentager returned claimant to work on December 5, 2002, with the restriction that she avoid vibratory tools for 30 days and, upon return to work, wear an impact glove. In his January 9, 2003 report to Lynda Metsker, of respondent's attorney's office, Dr. Korentager assessed claimant a 10 percent functional impairment to each upper extremity, which translates into a 12 percent whole body impairment based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). He provided no additional restrictions beyond those contained in the December 5, 2002 return to work form. However, at his deposition, he advised that it would be preferable that claimant also avoid repetitive movements with small objects that require fine coordination, avoid lifting objects weighing more than 15 to 20 pounds and avoid using objects which require four or five twists in a tightening manner more than eight to ten times an hour. He felt those types of activities would further exacerbate her symptoms. While not listing them specifically as restrictions, he identified them as guidelines for claimant to follow.

Claimant was referred by her attorney to Edward J. Prostic, M.D., board certified orthopedic surgeon, for an evaluation on July 30, 2001. Dr. Prostic identified numbness and tingling in claimant's ring and little fingers, with swelling and night awakening. Claimant had a slightly positive Tinel's at the wrist on the right side, with all other upper extremity examinations being normal. He advised claimant to avoid repetitive gripping and also avoid power and impact tools. He also assessed claimant a 12 percent whole body impairment pursuant to the *AMA Guides* (4th ed.). Dr. Prostic appeared to find Dr. Korentager's restrictions and guidelines to be appropriate, but with the temporary restrictions to be made permanent.

Dr. Prostic was provided a task list, which had been earlier created by vocational expert Michael Dreiling. He agreed with Mr. Dreiling's representation that claimant was no longer able to perform six of seven tasks on the list for an 86 percent task loss. That is the only task loss opinion contained in this evidentiary record. Dr. Prostic did acknowledge that except for a two point discrimination and mild Tinel's on the right, claimant's examination was normal, although claimant did have a weaker than expected grip strength, which he determined was due to ulnar nerve pain in her elbow.

The parties went to regular hearing on December 10, 2002. At that time, the Administrative Law Judge set terminal dates for claimant of January 17, 2003, and for respondent of February 17, 2003. Those terminal dates passed, and the parties submitted their submission letters and briefs to the Administrative Law Judge, with respondent's being filed on March 3, 2003. On that same date, respondent filed a Motion To Reopen Case And Extend Terminal Dates. Respondent requested permission to take the deposition of Thomas Meier, respondent's supervisor of labor relations in Kansas City. It does not appear that a hearing was ever held regarding respondent's Motion To Reopen

Case And Extend Terminal Dates. There were handwritten notes in the file, that appear to be from the administrative assistant to the Administrative Law Judge, indicating that there may have been an extension of terminal dates. Claimant did not respond to that request nor make any written objection to respondent's Motion before the deposition of Mr. Meier. However, claimant's attorney strongly objected to any extension and further objected to the taking of Mr. Meier's deposition at the time the deposition was scheduled, on April 1, 2003. On April 17, 2003, claimant filed a letter objecting to any evidence taken "subsequent to terminal date of Respondent." There is no order in the file indicating any extension of terminal dates was ever granted by the Administrative Law Judge.

As of the time of regular hearing, claimant had not returned to work for respondent, nor was there any indication that she was seeking employment in any other fashion or with any other potential employer.

In her brief and at oral argument to the Board, claimant renewed her objection to the inclusion of the deposition of Mr. Meier, arguing that it was outside respondent's terminal date. The Board agrees. K.S.A. 44-523(b) instructs that an administrative law judge:

shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter.

The statute goes on to allow an extension of the time limits if all parties agree. If the parties do not agree, then an extension may be granted:

- (1) If the employee is being paid temporary or permanent total disability compensation;
- (2) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment sent prior to the submission by the claimant; or
- (3) on application for good cause shown.

It is acknowledged, in workers' compensation litigation, that the parties are not bound by the technical rules of evidence.²

² *Pence v. Centex Construction Co.*, 189 Kan. 718, 371 P.2d 100 (1962).

However, the plain terms of the statute cannot be ignored in disregarding those technical rules.³ In this instance, the Administrative Law Judge scheduled terminal dates after the December 10, 2002 regular hearing, with claimant's being January 17, 2003, and respondent's being February 17, 2003. Those terminal dates came and went, with no request by either party for an extension. It was not until March 3, 2003, after the case had already been submitted and on the same day respondent filed its submission letter with the Administrative Law Judge, that respondent filed its Motion To Reopen Case And Extend Terminal Dates. No hearing was held and no order was issued by the Administrative Law Judge granting an extension of the terminal dates. Additionally, claimant, at the beginning of the deposition, timely objected to the taking of Thomas Meier's deposition, making clear the objection as the deposition was beyond the terminal dates established by the court. The Board finds that pursuant to K.S.A. 44-523, no extension of terminal dates was granted by the Administrative Law Judge and, therefore, the untimely deposition of Mr. Meier will not be considered in this record.

While there were notes in the file indicating the Administrative Law Judge may have informally considered the Motion, those notes were not sufficiently clear to verify that an extension was actually granted by the Administrative Law Judge. In the future, a proper order from the Administrative Law Judge is advised.

K.S.A. 44-510e(a) defines functional impairment as:

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Both Dr. Korentager and Dr. Prostic assessed claimant a 12 percent impairment to the body as a whole pursuant to the *AMA Guides* (4th ed.). The Board finds that claimant has suffered a 12 percent impairment to the body as a whole for the injuries suffered through June 18, 2001, her last day worked with respondent.

Claimant contends she is entitled to a work disability under K.S.A. 44-510e, with respondent arguing that claimant did not act in good faith in refusing to return to respondent's facility for a "fit for duty" physical examination. This fit for duty examination was scheduled for February 5, 2003, well after claimant's June 18, 2001 last date of employment. Respondent's attorney argued the examination was scheduled shortly after the January 30, 2003 deposition of Dr. Korentager, at which time the parties were informed that claimant's restrictions had been modified as of December 5, 2002, with the only

³ *Fougnie v. Wilbert & Schreeb Coal Co.*, 130 Kan. 410, 286 Pac. 396 (1930).

restrictions being that claimant avoid vibratory tools for 30 days and that she wear an impact glove upon her return to work. However, respondent's attorney acknowledged that respondent's plant was scheduled to shut down as of February 7, 2003, with no additional work available to claimant after that date. Additionally, respondent's attorney was unable to pinpoint in the record any indication that claimant had been offered, or was going to be offered, a job after the scheduled fit for duty physical examination. Without evidence in the record to verify that a job was going to be made available to claimant, the Board cannot find that claimant acted in bad faith with regard to the potential return to work on February 5, 2003.

The Board, however, finds that claimant failed to provide evidence of a good faith job search after leaving respondent's employment on June 18, 2001. The parties acknowledged at oral argument that claimant was being paid her regular wages in lieu of temporary total disability compensation. There is no indication in the record when this compensation ceased. However, the December 5, 2002 report from Dr. Korentager clarifies that claimant was physically capable of returning to work as of that date, with the reduced restrictions discussed above. The Board, therefore, finds that claimant's period of temporary disability ceased as of that date, entitling claimant to a permanent disability based on a functional impairment, a permanent partial general disability, or both.

K.S.A. 44-510e(a) defines permanent partial general disability as:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

In this record, there is only one opinion regarding what, if any, task loss claimant has suffered. Dr. Prostic opined claimant was incapable of performing six of the seven tasks listed in Mr. Dreiling's task report, resulting in a task loss of 86 percent. The Board acknowledges that this task loss percentage appears somewhat inflated, especially considering the limited findings by both Dr. Prostic and Dr. Korentager during their examinations of claimant. However, uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.⁴ The Board does not find the opinion of Dr. Prostic to be sufficiently untrustworthy as to be disregarded and, therefore, adopts this uncontradicted opinion regarding claimant's loss of task performing abilities.

⁴ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

K.S.A. 44-510e requires an averaging between the task loss suffered by claimant and the wage loss suffered by claimant as a result of the injury. However, that statute must be read in light of *Foulk*⁵ and *Copeland*.⁶ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. As noted above, in this instance, the Board does not find claimant in violation of the policy set forth in *Foulk*, as it was not verified in the record that any accommodated job paying a comparable wage had actually been offered to claimant.

In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident. In this instance, the evidence regarding claimant's post-injury attempt to obtain employment is extremely limited. The Board cannot find that claimant put forth a good faith effort to obtain employment after being released by Dr. Korentager on December 5, 2002. The Board will, therefore, pursuant to *Copeland*, impute a wage to claimant based upon her ability to earn wages.

If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁷

In this instance, Michael Dreiling, claimant's vocational expert, opined that claimant was capable of earning up to \$8 an hour in the open labor market. The Board will, therefore, impute to claimant a wage, based upon claimant's ability to earn \$8 an hour and a 40-hour week, of \$320 per week. When compared to claimant's stipulated average weekly wage of \$960.54, this results in a wage loss of 67 percent.

As K.S.A. 44-510e mandates an averaging between the wage loss and task loss percentages, the Board finds claimant's 67 percent wage loss, when averaged with her 86 percent task loss, results in a work disability of 76.5 percent.

⁵ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁶ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁷ *Id.* at 320.

The Board further finds that this work disability becomes effective as of December 5, 2002, when claimant was released by Dr. Korentager to return to work. The period before that time was apparently covered by the contractual agreement between the parties that claimant would be paid her regular wages in lieu of temporary total disability compensation. As no temporary total disability compensation was specifically requested by claimant or paid by respondent, none will be considered at the time of the computation of this final award. The Board, therefore, finds that the Award of Administrative Law Judge Robert H. Foerschler dated May 30, 2003, should be modified to grant claimant a permanent partial general disability of 76.5 percent to the body as a whole effective December 5, 2002.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated May 30, 2003, should be, and is hereby, modified, and claimant is granted an award against respondent based upon an average weekly wage of \$960.54 and a date of accident of June 18, 2001, for a 76.5 percent permanent partial general disability to the body as a whole, with payments effective December 5, 2002.

Claimant is entitled to 249.38 weeks of permanent partial general disability compensation at the rate of \$401 per week, for an award not to exceed \$100,000.

For the period December 5, 2002, through December 4, 2003, claimant is entitled to 52.14 weeks permanent partial general disability compensation in the amount of \$20,908.14, which is ordered paid in one lump sum minus any amounts previously paid. Thereinafter, claimant is entitled to 197.24 weeks permanent partial general disability compensation at the rate of \$401 per week totaling \$79,091.86, until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of December 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Ronald A. Prichard, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director